[* 1]
SCANNED ON 10/29/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Gische PART 10

Justice

Chung

- v -

1030 Fifth Ave

INDEX NO. 109840/03

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Stay/Mot

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/28/08

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

TERRY CHUNG and JASSODIE CHUNG,

Plaintiffs,

-against-

1030 FIFTH AVENUE CORPORATION, INSIGNIA RESIDENTIAL GROUP and B&F CORPORATION, STEVEN PUCCINELLI, SABRINA PUCCINELLI and TACONIC DEVELOPERS & BUILDERS, INC.,

Defendants.

1030 FIFTH AVENUE CORPORATION, INSIGNIA RESIDENTIAL GROUP,

Third-Party Plaintiffs,

-against-

NICLIN BUILDERS, INC. and PALMUCCI INSURANCE AGENCY,

Third-Party Defendants.

NICLIN BUILDERS, INC.,

Second Third-Party Plaintiff,

-against-

PALMUCCI INSURANCE AGENCY,

Second Third-Party Defendant.

STEVEN PUCCINELLI and SABRINA PUCCINELLI,

Third Third-Party Plaintiff,

-against-

TACONIC BUILDERS, INC.,

Third Third-Party Defendant.

DECISION/ORDER
Index No.: 109840/03
Seq. No.: 006/007

Hon. Judith J. Gische
J.S.C.

Index No.: 113804/05

Index No.: 590445/05

Index No.: 590608/05

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers - Motion Sequence Number 006	**Numbered**
Niclin's OSC (stay, sj) w/SF affirm, exhs	1
SF emergency affirm	2
Palmucci affirm in opp (MT), exhs	3
Niclin's reply affirm	4

Papers - Motion Sequence Number 007	**Numbered**
1030's n/m (§3212) w/MAT affirm, exhs	1
Pltf's affirm in opp (KNB), exhs	2
Niclin's partial opp affirm (SF)	3, 4
1030's reply affirm (MAT)	5
1030's reply affirm (MAT)	6
Niclin's supplemental reply affirm (SF)	7

Upon the foregoing papers the court's decision is as follows:

In the main action, plaintiff Terry Chung ("Chung") seeks to recover monetary damages for personal injuries he claims to have sustained while working at the gut renovation of a co-op residence in the building located at 1030 Fifth Avenue, New York, New York (the "premises") on August 13, 2002. Plaintiff Jassodie Chung is Chung's wife and has interposed a loss of services claim.

In motion sequence number 007, defendants 1030 Fifth Avenue Corporation ("1030"), Insignia Residential Group ("Insignia") and Taconic Developers & Builders, Inc. ("Taconic" and collectively herein referred to as the "Owner/GC Defendants") move for summary judgment: [1] dismissing plaintiff's claims pursuant to Labor Law §§ 200 and 241 (6); and [2] granting Taconic summary judgment on its contractual

indemnification cross-claim against Niclin Builders, Inc. ("Niclin"), Chung's employer. Plaintiffs oppose the motion in its entirety. Niclin adopts the Owner/GC Defendants arguments regarding dismissal of plaintiffs' claims but opposes that portion of the motion seeking indemnification from it.

In motion sequence number 006, third-party defendant/second third-party plaintiff Niclin moves for summary judgment in its favor and against third-party defendant/second third-party defendant Palmucci Insurance Agency ("Palmucci"), Niclin's insurance agent. CPLR § 3212. Niclin also sought a stay of the trial of this action pending a determination of the instant motion which has already been granted (order, Gische, J., 7/17/08). CPLR 2201. Palmucci opposes that portion of the motion seeking summary judgment relief.

Plaintiff's claims against Steven Puccinelli and Sabrina Puccinelli, the co-op shareholders who resided in the premises, have been voluntarily discontinued with prejudice by stipulation. B&F Corporation ("B&F") has not appeared in this action.

Issue has been joined, and since these motions were brought timely after the note of issue was filed, they will be considered on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). Since the disposition of each motion sequence directly impacts the other, they are hereby consolidated for consideration in a single decision/order.

Relevant Facts

In August 2002, 1030 owned the building in which the premises was located and Insignia was the managing agent. Taconic was the general contractor on a gut

rehabilitation project at the premises which commenced on or about May 2002. Taconic hired Niclin as a subcontractor to perform carpentry work and they executed a subcontractor agreement with respect thereto.

On August 13, 2002, Chung was employed by Niclin as a carpenter. On that same date, plaintiffs allege that during the performance of hanging sheetrock at the premises, plaintiff was caused to sustained serious personal injuries (the "accident"). Chung testified at his deposition that he was working with a co-worker, attaching 4 x 6 feet pieces of drywall to a metal frame on a 10-12 foot-high ceiling in a hallway approximately 10 x 15 feet in size. The accident occurred while Chung was ascending an eight-foot metal A-frame ladder and simultaneously elevating a piece of sheetrock in conjunction with his co-worker. Chung's co-worker was working on an identical ladder several feet away from Chung and his ladder. After successfully installing two pieces of sheetrock, while attempting to attach a third piece, the ladder slid and Chung fell. Specifically, Chung was about to step on the fifth rung of the ladder with his right foot, from the fourth rung, and at approximately four feet above the floor, when the ladder skid, thereby causing Chung to lose his balance. Chung fell onto a ceramic tile-covered floor, to the right of where he was working, and landed on his right shoulder; the ladder fell to the left of where Chung was working. Chung does not know what caused the ladder to slide.

There was a table saw approximately 4 x 4 feet in size which, at the time of the accident, was two feet away from the ladder he was working on. The table saw did not have a guard and the blade was exposed. Chung testified that as he fell, he "push[ed]

away with [his] foot before [he] could fall on the saw" to stop himself from falling thereon. Chung was not wearing any safety equipment at the time of the accident.

Chung further testified as follows:

Q. Other than yourself and the other man and the staircase, sheetrock, two ladders and the table saw and your tools, what else was in the room at the moment you started working?

A. Like what do you mean?

Q. Things, not people, just things?

A. The floor was tile and it had papers on the floor to cover up the tiles not to get scratched.

...

Q. What color was the paper on the floor?

A. Regular construction paper that they cover the floors with.

Q. Okay.

A. Like a brownish colored paper.

Q. You don't know who put it down?

A. No.

Q. The brownish construction paper, were there sections connected or laid out without connections such as tape?

A. The tape was down all over the place.

...

Q. One layer of brown paper on the top?

A. Yes.

Q. Okay.

A. I guess.
[Chung's counsel]: Don't guess. Only if you know. He wants to know how many layers of paper were there.

[Chung]: I don't know.

Q. Is there anything on top of the paper such as sawdust, any other construction debris or material whatsoever that you recall before you started working?

A. He had dust on the paper.

Q. What kind of dust?

A. Like sheetrock dust.

Q. It looked like sheetrock dust?

A. Yes.

Q. Would you describe it as a thick layer, thin or you don't recall, something else?

A. I don't know.

Other versions of Chung's accident have been presented. Hans Wohning ("Wohning"), Niclin's principal, testified at his deposition that one of Niclin's employees present at the time of the accident, Louie Pinado ("Pinado") observed Chung standing on the table saw, "holding something up on the ceiling" and then suddenly, the table saw tipped over, thereby causing Chung's alleged injuries. Mr. Pinado was not separately deposed and this testimony is not admissible evidence.

Genndey Kuznetsov ("Kuznetsov"), however, another Niclin employee who worked at the project and was Chung's partner at the time of the accident, also

submitted to a deposition. Kuznetsov testified that he was on a ladder attaching a piece of sheetrock to a ceiling frame, while Chung was standing on the floor holding the other end of the sheetrock up to the ceiling with a stick. Kuznetsov stated that Chung was not on a ladder, and while Kuznetsov had his back facing Chung, he heard a noise, and turned around to observe Chung on the floor and the table saw flipped over. Kuznetsov testified that he did not know why the table saw flipped over.

As is relevant to this motion, plaintiffs have asserted causes of action under Labor Law §§ 200 and 241(6).[1]

Applicable Law on a Summary Judgment Motion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Only if it meets this burden, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form that would require a trial of this action (Zuckerman v. City of New York, *supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

---

[1] Plaintiffs have also alleged a claim under Labor Law § 240 (1), but none of the parties have moved with respect thereto.

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film , 3 NY2d 395 [1957]). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2d Dept 2003]).

Labor Law § 241 (6)

The Owner/GC Defendants argue that plaintiffs' claims pursuant to Labor Law § 241 (6) must be dismissed because the Industrial Code provisions cited by plaintiffs do not apply to the case at bar. Plaintiffs have, in their opposition papers, withdrawn claimed Industrial Code violations pursuant to 12 NYCRR §§ 23-1.8 (c), 23-1.30, 23-1.32 and 23-2.5. Plaintiffs' remaining Industrial Code violations are: 12 NYCRR §§ 23-1.17 (Life nets), 23-1.31 (Approval of materials and devices), 23-1.7 (d) (Protection from general hazards; Slipping hazards) and (e) (Protection from general hazards; Tripping and other hazards), 23-1.15 (Safety railing), 23-1.16 (Safety belts, harnesses, tail lines and lifelines), 23.1.21 (e) (IV) (Ladders and ladderways), and 23.2.1 (a) (2) (Storage of materials or equipment) applies to the facts of this case.

Section 241 (6) of the Labor Law imposes a nondelegable duty upon an owner, general contractor, or their agents, to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or

excavation operations in a manner that provides for the reasonable and adequate protection of persons working at the site (Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343, 350 [1998]). Supervision of the work, control of the work site or actual or constructive notice of a violation of the Industrial Code is not necessary to impose vicarious liability against owners and general contractors, so long as someone in the construction chain was negligent (Rizzuto v. L.A. Wenger Contracting Co., Inc., *supra*; DeStefano v. Amtad New York, Inc., 269 AD2d 229 [1st Dept 2000]). To support a cause of action, plaintiffs must plead a concrete specification of the Industrial Code, that it was violated, and that the violation was a proximate cause of his injuries (Rizzuto v. L.A. Wenger, *supra*).

Turning to the particular Industrial Code provisions at issue, the court finds: 12 NYCRR § 23-1.16 is inapplicable because it sets forth safety standards and specifications for safety belts, harnesses, tail lines and lifelines, and none of these safety devices were provided to Chung (see i.e. Dzieran v. 1800 Boston Road, LLC, 25 AD3d 336). Similarly, 12 NYCRR §§ 23-1.15 and 23-1.17 are inapplicable because there is no dispute that a safety railing and a life net were not provided to Chung (id). 12 NYCRR § 23-1.31 (Approval of materials and devices) also does not apply here because it is a general provision regarding procedures by which an owner or general contractor may seek approval from the Industrial Board of Appeals for "any device, apparatus, material, equipment or method" to be used in compliance with the Labor Law (see generally Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494).

There is, however, an issue of fact as to whether 12 NYCRR § 23-1.7 (d)

(Protection from general hazards; Slipping hazards) was violated. Section 23-1.7 provides in pertinent part as follows:

> (d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Here, there are questions of fact as to whether there was a slippery condition with respect to the floor upon which his ladder was placed and whether this condition caused Chung's accident. Based upon Chung's testimony, before he started working, there were sheets of brown construction paper on the floor, and sheetrock dust on the construction paper, upon all of which Chung's ladder was placed. The fact that Chung did not know exactly how many sheets of construction paper were on the floor is insufficient to resolve this material dispute. Kuznetsov's version of how Chung sustained his injuries, may raise issues of credibility regarding Chung's version of the events, but they do not resolve the disputed facts identified herein. For these reasons, the Owner/GC Defendants have not met their burden in establishing that Chung did not sustain his injuries when a ladder upon which he was working slipped because it was placed on brown construction paper and/or sheetrock dust (see i.e. Partridge v. Waterloo C.S.D., 12 AD3d 1054; Earl v. Starwood Ceruzzi Saratoga, LLC, 9 AD3d 879). Therefore, the Owner/GC Defendants are not entitled to summary judgment.

The court rejects the Owner/GC Defendants arguments that Section 23-1.7 (d) does not apply because Chung worked in a room rather than a passageway. The floor

in Chung's work area is within the purview of this industrial code provision because it is not limited only to passageways (see i.e. Colucci v. Equitable Life Assurance Society of the United States, 218 AD2d 971).

The court also rejects the Owner/GC Defendants' argument that the sheetrock dust constituted normal dirt and gravel and therefore was not the type of substance contemplated by this industrial code provision. The Owner/GC Defendants' argument that the sheetrock dust was created by the very work being performed by Chung is also unavailing becauseChung testified that he observed the dust before he began working.

However, there is no evidence that a tripping hazard caused plaintiff's accident. Therefore, plaintiff's claim predicated on 12 NYCRR § 23-1.7 (e) (2) is hereby severed and dismissed.

12 NYCRR § 23-1.21 (e) (IV) sets forth general requirements for ladders. Plaintiffs' argue that this provision is relevant because its requires that ladder steps be "corrugated, knurled, dimpled, coated with skid-resistant materials or otherwise constructed or treated to minimize slipping." Although plaintiffs claim that Chung's testimony "regards skidding or slippage of the frame of the ladder", Chung did not testify that there was any slipping condition on the steps of the ladder. Nor have plaintiffs otherwise provided any evidence that would support a claim that the ladder violated this industrial code provision. Therefore, 12 NYCRR § 23-1.21 (e) (IV) is inapplicable.

Finally, the court rejects the Owner/GC Defendants' argument that 12 NYCRR § 23-2.1 (a) (2) does not apply here. Industrial Code § 23-23-2.1 (a) (2) provides that

"[m]aterial and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge." Plaintiff has testified that his fall was affected by the unsafe placement of the table saw. The Owner/GC Defendants have failed to establish that the table saw was not placed or stored in an unsafe manner.

Accordingly, defendants' cross-motion for summary judgment is granted only to the following extent: [1] that the Labor Law § 241 (6) cause of action premised on Industrial Code §§ 23-1.8 (c), 23-1.30, 23-1.32, 23-2.5, 23-1.15, 23-1.16, 23-1.17, 23-1.31, 23-1.7 (e) (2), 23-1.21 (e) (IV) is hereby severed and dismissed; the cross-motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim based upon violations of Industrial Code §§ 23-1.7 (e) (2) and 23-2.1 (a) (2) is denied.

Labor Law § 200 claim and common law negligence

The Owner/GC Defendants also move for summary judgment dismissing plaintiffs' claim under Labor Law § 200. Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (Rizzuto v. L.A. Wenger Contracting Co., *supra*). Unlike Labor Law §§ 240 (1) and 241 (6), liability can only be imposed if the defendant has actually been negligent. A *prima facie* case requires that plaintiff prove the defendant exercised supervisory control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st Dept 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Rizzuto v. L.A. Wenger Contracting Co., *supra* at 352; Gonzalez v. United

Parcel Serv., 249 AD2d 210 [1st Dept 1998]).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either the common law or Labor Law § 200 (Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993]). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim (Hughes v. Tishman Construction Corp., 40 AD3d 305 [1st Dept 2007]; Brown v. New York City Economic Dev. Corp., 234 AD2d 33 [1st Dept 1996]; Gonzalez v. United Parcel Serv., *supra*). It must be shown that the contractor controlled the manner in which the plaintiff performed his or her work, i.e. how the injury producing work was performed (Hughes v. Tishman Construction Corp., *supra* at 2). However, the determinative factor in establishing an owner or general contractor's control is whether the authority to control plaintiff's work existed, not whether it was exercised (Farduchi v. United Artists Theatre Circuit, Inc., 23 AD3d 610).

Hans Wohning ('Wohning"), Niclin's principal, testified that Niclin was the sole entity that directed plaintiff's work. Barry Riordan (the "superintendent"), superintendent of the building employed by Insignia, testified that he visited the premises every other day during the renovation and interacted only with Taconic's foreman. The superintendent testified as follows:

Q. What would be your interaction with [Taconic's foreman]?

A. I would visit with [Taconic's foreman] every other day to discuss what was happening, how his workers were performing within the public areas of the building, and I would take a look around the apartment with him to see, to monitor the progress.

John Emr ("Emr"), employed by Taconic as site supervisor, testified on behalf of Taconic, as follows:

Q. When you were the site supervisor... can you tell me the frequency with which you were at [the premises]."

A. I was there forty hours a week, eight hours a day, start to finish.

Q. Generally speaking, what would you do while you were there?

A. I would make phone calls to subcontractors, walk around, criticize, supervise.

..

Q. On any occasions that you were at the [premises], did you ever direct any employee of a subcontractor to do work?

A. I would basically have my, you know – delegate the work to the foreman of the subcontractors.

Wohning testified that Niclin used its own equipment at the premises and was "in charge" of its own employees at all times during the project. Based on the foregoing, the Owner/GC Defendants have made a *prima facie* showing that they did not possess the authority to direct, control or supervise the work which led to Chung's injury. Plaintiffs' arguments that 1030 and Taconic delegated work to Niclin, plaintiff's

employer, is unavailing because such delegation does not demonstrate supervisory control, but rather, at most, general supervision which is insufficient to trigger liability (Singh v. Black Diamonds LLC, 24 AD3d 138 [2005]; Reilly v. Newireen Associates, 303 AD2d 214 [1st Dept 2003]; see also Chuqui v. Church of St. Margaret Mary, 39 AD3d 397 [1st Dept 2007]). Moreover, it is of no moment that 1030 Fifth Avenue was "empowered to suspend work if necessary" (McCoy v. Metropolitan Transp. Authority, 38 AD3d 308 [1st Dept 2007]).

Nor is there any evidence which would support a finding that the Owner/GC Defendants had actual and/or constructive notice of the alleged dangerous conditions, specifically the table saw, construction paper and sheetrock dust (O'Sullivan v. IDI Construction Co., Inc., *supra*; Maldonado v. Metropolitan Life Ins. Co., 289 AD2d 176 [1st Dept 2001]; Canning v. Barney's New York, 289 AD2d 32 [1st Dept 2001]). Accordingly, plaintiffs' Labor Law § 200 claim against the Owner/GC Defendants is severed and dismissed.

Taconic's indemnification claim

Taconic argues that it is entitled to indemnification from Niclin pursuant to a subcontractor agreement between these parties dated March 12, 2002 (the "contract"). The relevant portion of the contract follows:

> Insurance
> Subcontractor will provide Certificates of Workers Compensation and General Liability Insurance listing Taconic Builders, Inc. as holder and as additional insured and dated to cover the duration of the work, prior to commencement of the job. [Niclin] shall indemnify and hold harmless [Taconic] from any and all liability, costs,

> damages, attornes fees and expenses from any claims or causes of action of whatsoever nature *arising out of or related to [Niclin's] work, negligence or acts or those of its employees, representatives, suppliers or others performing work for [Niclin]* and from and against all applicable sales and use taxes specified herein (emphasis added).

A party may expressly agree to hold another party harmless for claims brought against it by a third party. Mas v. Two Bridges Associates by Nat. Kinney Corp. 75 NY2d 680 [1990]. The amount of damages recoverable based upon contractual indemnification is controlled by the terms of the indemnification agreement (see i.e. Felker v. Corning Inc., 90 NY2d 219 [1997]. GOL § 5-322.1 provides that an agreement which purports to indemnify the indemnitee against liability for damages caused or resulting in whole or part from indemnitee's negligence "is against public policy and is void and unenforceable."

Based on the clear language of the agreement, Niclin has a duty to indemnify and hold harmless, irrespective of any fault on the part of the Taconic. However, although Niclin agreed to indemnify Taconic for all claims "arising out of or related to [Niclin's] work" pursuant to the subcontract, Niclin is contractually obligated to indemnify Taconic against liability arising from plaintiff's claim provided that Taconic is free from negligence (Brink v. Yeshiva University, 259 AD2d 265 [1st Dept 1999]). Since Taconic has prevailed on its motion for summary judgment dismissing plaintiff's Labor Law § 200/common law negligence claim, Taconic is entitled to summary judgment on its contractual indemnification cross-claim against Niclin.

Niclin's motion for summary judgment against Palmucci

Pursuant to the contract, Niclin was obligated to indemnify Taconic with respect to its work at the project. Palmucci issued a Certificate of Insurance dated August 6, 2002 to Niclin for commercial liability insurance from Essex Insurance Co. ("Essex"), effective 7/26/02 - 7/26/03, and Worker's Compensation coverage from Selective Insurance Co. ("Selective"), effective 11/02/01 - 11/02/02. The aforementioned insurance policies have not been provided to the court.

The Certificate of Insurance also provides: "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below."

After Chung sustained his injuries on August 13, 2002, Niclin presented Chung's Worker's Compensation claim to Selective. Selective disclaimed, citing non-payment of the premium.

Palmucci claims that Niclin was frequently late in making its premium payments. Palmucci has provided to the court a copy of a fax letter dated August 2, 2002 that John Palmucci sent to Niclin stating that a premium payment of $2,255 needed to be paid to get the insurance "back on track".

On August 14, 2002, one day after Chung's accident, Palmucci received the premium payment of $2,555 from Niclin and gave Niclin a receipt evidencing the payment dated 8/14/02. Niclin claims that this payment was timely. Nonetheless, Niclin also argues that it is of no moment that the payment was made on August 14, 2008 and after the Certificate of Insurance was issued, because the Certificate of Insurance

constitutes a binder.

John Palmucci, Palmucci's principal, testified as follows:

Q. What is a binder?

A. A binder is used as proof of insurance until a policy is issued.

...

Q. Am I correct that when you would give a quote and try to place insurance you would take a premium and issue a binder or you would issue a binder and then follow for the premium and you use Acord forms for that purpose?

A. If a binder is requested, they are not always requested.

...

Q. But if the check cleared then coverage would have been effective as of the date stated in the binder, correct?

A. Should be, yes.

Q. So even if the check cleared days or even a matter of weeks after the date listed in the binder the coverage would date back to the date stated in the binder, correct, by the way you operated?

A. If a binder was issued, yes.

Q. Did you regularly issue binders to Niclin Builders?

A. No, I don't recall ever issuing them a binder.

Q. Did you ever issue a document indicating insurance coverage to Niclin Builders before receiving a premium check for that coverage?

A. I don't remember if we did.

By letter dated June 30, 2003, Palmucci wrote the following to Niclin:

> Please be advised that at the date of loss concerning Terry Chung 08/13/02, there was no coverage in force, due to an error that may have been made by our office. This matter is being referred to our E&O carrier.

Palmucci further testified at his deposition as follows:

> Q. Payment not being processed, what does that mean?
>
> A. ... The payment wasn't disbursed to the carrier.
>
> Q. Who failed to disburse the payment to the carrier?
>
> A. Well, ultimately I'm responsible, even though I only sign the checks but I'm still the responsible person.
>
> Q. Why are you ultimately responsible?
>
> A. Because it's my agency, I hold the license.
>
> Q. And whatever your employees do?
>
> A. I'm responsible.

Niclin commenced the second third party action wherein it has asserted two causes of action against Palmucci, sounding in negligence and breach of contract and Niclin also seeks its attorneys fees and expenses incurred in connection in this action. Niclin argues that Palmucci is liable for Niclin's damages in this action because Palmucci failed to keep the relevant policies in force after promising to do so, by failing to forward the premium payments to the Workers' Compensation and liability insurance carriers. Niclin claims that it justifiably relied to its detriment on Palmucci to secure the liability and Worker's Compensation insurance coverage indicated in the Certificate of Insurance.

Summary judgment is not warranted for the reasons that follow. The insurance policies upon which Niclin's claims are premised have not been provided to the court, therefore, the court is unable to ascertain whether Niclin would be afforded coverage thereunder for the accident had insurance not been disclaimed.

There is a material dispute of fact as to whether Niclin timely made the premium payment. Moreover, if Niclin's payment was untimely, there is a further issue of fact as to whether this late payment had any affect on the coverage dates stated on the Certificate of Insurance.

Accordingly, Niclin's motion for summary judgment is denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion for summary judgment by defendants 1030 Fifth Avene Corporation, Insignia Residential Group and Taconic Developers and Builders, Inc. (motion sequence number 007) is granted only to the following extent: [1] plaintiffs' Labor Law § 241 (6) cause of action premised on Industrial Code §§ 23-1.8 (c), 23-1.30, 23-1.32, 23-2.5, 23-1.15, 23-1.16, 23-1.17, 23-1.31, 23-1.7 (e) (2), 23-1.21 (e) (IV) is hereby severed and dismissed; [2] plaintiffs' Labor Law § 200 claim is hereby severed and dismissed; and [3] Taconic Developers and Builders Inc. is granted summary judgment on its contractual indemnification cross-claim against Niclin Builders, Inc.; and it is further

ORDERED that motion sequence number 007 is otherwise denied; and it is further

ORDERED that the motion for summary judgment by Niclin Builders, Inc. (motion sequence number 006) is denied in its entirety; and it is further

ORDERED that this action is hereby restored to the active calendar in Part 40 for trial. Plaintiff shall serve a copy of this decision/order on the Clerk in Trial Support so that this case can be scheduled for jury selection.

Any requested relief that has not been addressed herein has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
October 28, 2008

So Ordered:

Hon. Judith J. Gische, JSC